Supreme Court, U.S.
FILED

NO. 931994 APR - 7 1994

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAY'S WESTERN WEAR, INC.
Petitioner

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA

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71PP

QUESTIONS PRESENTED FOR REVIEW

I. Did the Louisiana Court of Appeal, Third Circuit, err in finding that Hay's Western Wear, Inc. was not entitled to full and just compensation for the taking of its property, thus violating its rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and/or Article 1, Section 4 of the Louisiana Constitution of 1974?

II. Did the Louisiana Court of Appeal, Third Circuit, err in its review of the record by holding that Hay's Western Wear Inc. did not suffer an unreasonable and substantial interference with its property right of access when for a period exceeding one year the State's construction activities repeatedly confused and frustrated travelers of La. Hwy. 397 by causing road closures to switch back and forth without notice from one end of the construction project to the other and, on many lengthy occasions, simultaneous closure at both ends of the project, by failing to provide adequate detour signs, and by failing to provide adequate official alternate routes which resulted in dumping traffic onto little known, dangerous and narrow gravel surfaced farm roads?

III. Whether the "taking" clauses of the 5th and 14th

Amendments of the United States Constitution and Article 1, Section 4 of the Louisiana Constitution permit the denial of compensation for damages incurred by an unreasonable and substantial governmental interference with a citizen's property right of access because the interference to the property right is not unique only to him or it but is general to the public and/or the interference is partial and temporary?

IV. Did the Louisiana Court of Appeal, Third Circuit, violate the constitutional right of Hay's Western Wear Inc. to due process as guaranteed by the 5th and 14th Amendments to the Constitution of the United States by violating its own recognized rules of appellate review, in particular the long established jurisprudential "manifest error" rule by setting aside the trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or refusal.

1. Hay's Western Wear, Inc. through is President, Ray Harris.

2. Ernest C. Hunt, Jr., Hunt Law Firm, and Steven C. McGinity.

3. Ronald J. Bertrand, Special Counsel to the Attorney General of Louisiana and the State of Louisiana Department of Transportation and Development.

4. Hon. Richard Ieyoub, Attorney General for the State of Louisiana.

5. Hon. Kenneth DeBlanc, Clerk, Louisiana Court of Appeals, Third Circuit.

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JURISDICTION

The Supreme Court of the State of Louisiana denied the application of Hay's Western Wear, Inc., for Writ of Certiorari and/or Review to the Court of Appeal, Third Circuit, Number CA 92-1375; Parish of Calcasieu, Fourteenth Judicial District Court, Division "A" 83-6425 on January 7, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 which grants review of the validity of Article 1, Section 4 of the Louisiana Constitution on the ground of it being repugnant to the 5th and 14th Amendments to the United States Constitution and/or the right to due process claimed under the 5th and 14th Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. U.S. Const. Amend. V:

Capital crimes; double jeopardy; self-incrimination; due process just compensation for property

No person shall be held to answer for a capital, or otherwise in famous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval orces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. U.S. Const. Amend. XIV, Sec. 1:

Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. LSA-Const. Art. 1, Sec. 4:

Right to Property

Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

IV. LSA-C.C. Art. 667:

Limitations on use of property

Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

V. LSA-C.C. Art. 668:

Inconvenience to neighbor

Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

STATEMENT OF THE CASE

I. INTRODUCTION:

This litigation arises out of the total reconstruction and upgrading of 5.1 miles of Louisiana Highway 397, CALCASIEU Parish, Louisiana. For two years the State of Louisiana, Department of Transportation and Development ("State") supervised a series of construction activities along the highway that seriously impaired the ability of Hay's Western Wear, Inc. ("Hay's") to use and enjoy its premises as a retail western apparel store.

The major issue before this court is whether the State took and\or damaged Hay's property right to use and enjoy its premises as a retail sales western wear store when it substantially interfered with Hay's and its customers gaining access to the gene system of public roads by repeatedly confusing and frustrating travelers from the highway with construction activities that caused road closures to switch back and forth (sometimes by the hour) without notice from one end of the construction project to the other and, at extended periods of time, simultaneous

closure at both ends, that failed to provide adequate detour signs and that failed to provide adequate official alternate routes which dumped traffic onto little known, dangerous and narrow gravel surfaced farm roads.

II. PROCEEDINGS WHERE FEDERAL QUESTION RAISED:

Hay's filed this petition for damages on November 28, 1983.[1] Originally, the State was the only defendant.[2] Hay's subsequently amended its petition to include the State's contractor, R. L. Abshire Construction, Inc., and its insurers as party defendants. Those defendants were subsequently dismissed from this lawsuit and the only remaining defendant at trial was the State.[3]

After trial on the merits, the trial court found for Hay's, held that the State substantially interfered with Hay's right of

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[1]R.7

[2]Id.

[3]R. 393.

access, and awarded damages.[4] The Court of Appeal substituted its interpretation of the facts for the reasonable conclusions of the trial court and reversed the trial court's holdings.[5] On January 7, 1994, the Louisiana Supreme Court denied Hay's application for writ of certiorari.

As an inverse condemnation claim seeking "just compensation" from the State for a "taking" caused by governmental interference with a citizen's "property right," the "taking" clause of the 5th Amendment has been an underlying issue since the beginning of this matter.[6] Throughout the proceedings, Hay's has raised this issue through the applicable constitutional provisions and statutes of Louisiana on the theory that the Louisiana's "taking" clause cannot be more restrictive than that of the 5th Amendment. However, the Louisiana Third Circuit, Court of Appeal's interpretation of Louisiana's eminent

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[4]See, Reasons for Judgment of the Trial Court, Appendix B.

[5]See, Opinion of Court of Appeal, Third Circuit, State of Louisiana, NO. 92-1375, See Appendix C.

[6]See, Plaintiff's Petition at R. 7-8.

domain law as applied to the facts of this case is in direct conflict with the present state of federal eminent domain law. In consequence thereof, Hay's has been denied a right guaranteed to it by the United States Constitution.

III. STATEMENT OF THE FACTS:

For two years, from April, 1981 through April, 1983, the State supervised a construction project to totally reconstruct and completely upgrade a 5.1 mile stretch of La. Hwy. 397 in the Chloe-Manchester area of Calcasieu Parish, Louisiana.[7] This was not a simple repaving job. The total reconstruction of the highway involved widening of the road, extensive ditch/drainage work, laying numerous drainage pipes across the highway, removal and rebuilding a box culvert, removal and rebuilding a small bridge, complete excavation and replacement of the old asphalt and concrete base along the north one-half mile of the project, and then paving the entire project.[8] La. Hwy. 397, also

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[7]R. 820, 822-23; See also State, DOTD Weekly Force and Project Reports at R. 441-655.

[8]Ibid; R. 823-26.

known as Swift Plant Road, is the main road in the Chloe-Manchester area.[9] The construction project on this highway was bounded on the north by US Hwy. 90 and on the south by La. Hwy. 14.[10] Within this construction project, there were only two roads with blacktop surfaces that intersected the highway.[11] Both of these roads, Broad Street and East Prien Lake Road, form "T" intersections into La. Hwy. 397 and proceed west into the City of Lake Charles.[12] From the east, La. Hwy. 397 was intersected within the construction project by only a few small gravel surface farm roads; the most significant to this case are McCown Road and Joe Spears Road.[13] McCown Road and Joe Spears Road are 35 foot wide gravel surfaced parish farm roads that connect La. Hwy. 397 with a north/south roadway in the Chloe-

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[9]R. 785; See Exhibit P-2 at Appendix F.

[10]R. 822; See Exhibit P-2 at Appendix F.

[11]R. 786-87; See Exhibit P-2 at Appendix F.

[12]Id.

[13]R. 787-89, 804, 996, 1001-03, 1015, 1019; See Exhibit P-2 at Appendix F.

Manchester area connecting US Hwy. 90 and La. Hwy. 14.[14] Manchester Road, another narrow gravel surface road,[15] is the only other north/south roadway in the Chloe-Manchester area connecting US Hwy 90 and La. Hwy. 14.[16]

With respect to this case, there are three significant bridges over coulees and canals in this area. First, at the intersection of and/or just south of the intersection of Broad Street and La. Hwy. 397 there is a box culvert ("north bridge")[17] for drainage purposes that was completely reconstructed during this project.[18] Second, a short distance north of both Joe Spears Road and East Prien Lake Road is a bridge ("south bridge")[19]

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[14]R. 787-88; See Exhibit P-2 at Appendix F.

[15]R. 872-73.

[16]R. 786-87, 814; See Exhibit P-2 at Appendix F.

[17]During the trial of this case, the box culvert was most often referred to as the "north bridge". See R. 837-38, 1105-06.

[18]R. 797, 1105-06; See Exhibit P-2 at Appendix F.

[19]During the trial of this case this bridge was most often referred to as the "south bridge". See R. 838, 841, 1106.

over Kayouchee Coulee that was also removed and rebuilt during the construction project.[20] Third, there is a bridge (the "Manchester bridge") over the Farmer's Land & Canal Co. canal on Manchester Road between its intersection with McCown Road and its intersection with Joe Spears Road.[21] This Manchester bridge was closed for safety reasons during the construction project from January, 1982 through November, 1982 and, although not part of this construction project, the Manchester bridge was rebuilt while the project was in progress.[22]

For at least ten years prior to the beginning of the construction project, Hay's sold western apparel at the same location on La. Hwy. 397.[23] This retail sales western wear store is located on the east side of the highway between the north bridge and the south bridge at La. Hwy. 397's intersection with a

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[20]R. 823, 832, 841-42; See Exhibit P-2 at Appendix F.

[21]R. 792-93; See Exhibit P-2 at Appendix F.

[22]Id.

[23]R. 1101.

dead-end gravel road named Adele Street.[24]

Hay's customer base was mostly from the rural communities (such as, Cameron, Bell City and Hayes) within a thirty mile radius of the store.[25] Some of its other customers came from the Lake Charles area.[26] However, even though most of Hay's customers were from rural communities (75%), less than 20% were familiar with Manchester Road (25% of 75%) and even fewer customers knew of the existence of the narrow gravel parish farm roads east of La. Hwy. 397; such as McCown Road.[27] Hay's customers from the rural communities used the main roads such as US Hwy. 90 to La. Hwy. 397 when coming from the north and La. Hwy. 14 to La. Hwy. 397 when coming from the south.[28] The customers from Lake Charles also used the main roads; such as US Hwy. 90 or Broad Street to La.

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[24]See, the red dot on Exhibit P-2 at Appendix F.

[25]R. 986, 989-90.

[26]Id.

[27]R. 995-96; See also, 968-69, 984, 987.

[28]R. 996; See Exhibit P-2 at Appendix F.

Hwy. 397 when coming from the north and La. Hwy. 14 or East Prien Lake Road to La. Hwy. 397 when coming from the south.[29]

During the entire two years of the construction project, the State intended to discontinue through traffic on the 5.1 mile stretch of La. Hwy. 397.[30] When the project began in April, 1981, detour signs were erected on La. Hwy. 397 at its intersections with US Hwy. 90 and La. Hwy. 14 displaying the notice "ROAD CLOSED Local Traffic Only" and these signs remained until April, 1983 when the project ended.[31] The State's designated detour from the north was west three miles on US Hwy. 90 into the City of Lake Charles to La. Hwy 14 (a major thoroughfare in the City having numerous traffic lights, many retail establishments and a heavy traffic load), then south on La. Hwy. 14 approximately five miles to the point where La. Hwy. 14 turns east, then east three miles on La. Hwy. 14 to La. Hwy.

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[29]Id.

[30]R. 834-37.

[31]Id.; See also, Exhibit P-9C.

397.[32] The designated detour from the south was the same eleven mile route in reverse.[33] This detour by itself added at least one hour to a traveler's trip[34] and also directed western apparel shoppers into the heart of Lake Charles where Hay's major competitors were located.[35] Also, after the detour signs were erected, people who weren't required to travel on La. Hwy. 397, including shoppers of western apparel, simple avoided the area completely.[36] Hay's sales records reflect this occurrence.[37] Despite a steady growth in sales since at least 1978 and while other major competitors' sales continued to grow, the sales of Hay's leveled off before any major construction started as soon as the detour signs were erected in April, 1981.[38] The simple act

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[32]R. 834-37.

[33]Id.

[34]R. 972; See also 965.

[35]R. 957-58.

[36]R. 1035-37; See also 976, 1022-23.

[37]R. 665-66.

[38]Id.

of erecting detour signs caused some interference with Hay's business.[39]

A construction project has stages where the activity begins at a "low key" then progresses to a "high key", then drops off again to a "low key".[40] In this case, the construction activity was at a "high key" in excess of one year.[41] During this stage of "high key" activity, the interference with traffic flow on the project was "considered quite a bit" by the State's project engineer.[42] This activity included the use of numerous tractor trailers and other heavy machinery to perform the massive excavation work and extensive drainage and ditch work to widen, upgrade and reconstruct the entire highway.[43] For over one year, this "high key" activity was occurring simultaneously throughout the entire length of the project and always caused at

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[39]See, Id.

[40]R. 825-26.

[41]Id.

[42]Id.

[43]Id., See also R. 966.

several different points within the construction zone much interference with the traffic flow.[44]

In addition to and simultaneously with these activities, access to the store by Hay's and its customers was more severely interfered with when traffic flow was denied at points on the highway during the north bridge construction from October 5, 1981 to February 26, 1982,[45] the south bridge construction from June, 1982 through September, 1982,[46] the twenty-one cross drain installations across the highway at various times and various locations north and south of Hay's from March 6, 1982 to September 17, 1982,[47] and excavation and replacement of the entire asphalt and concrete base along the north one-half mile of the project from July 16, 1982 through October 17, 1982.[48]

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[44]R. 825-26; See also, 894-96, 976-77, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

[45]R. 838-39; See also Exhibit P-12 at Appendix G.

[46]R. 841-42; See also Exhibit P-12 at Appendix G.

[47]See Exhibit P-12 at Appendix G.

[48]R. 1062-63; See also Exhibit P-12 at Appendix G.

Further exacerbation of the access problems to Hay's included the ill-conceived planning that involved the activities causing closure of the highway, the lack of sufficient detours and detour information, the deplorable condition of McCown Road and the closure of the Manchester bridge from January, 1982 through November, 1982. The construction activities involving closure of the road were performed in a manner that caused, on numerous occasions, and without any apparent planning, the road closures to switch back and forth between the north end and the south end (sometimes on an hourly basis) and, at many extended periods of time, closure at both ends of the project simultaneously.[49] This caused frustration and confusion to the travelers on La. Hwy. 397 because they never knew which route, if any, would be open.[50] These travelers were further frustrated by the fact that there were no detour signs advising of alternate

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[49]See Exhibit P-12 at Appendix G.

[50]R. 894-96, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

routes when they encountered a road closure.[51] Additionally, the route via McCown Road, which was never an official detour route[52] but was often the only route available during the construction project,[53] was in terrible condition.[54] This narrow, gravel surfaced farm road had a one lane bridge with no guard rails and was always full of standing water, mud and potholes.[55] Vehicles would easily lose traction, slide through the slushy gravel and mud and some vehicles would end up stuck in up to ten inches of mud.[56] Even some trucks would drag bottom while traveling on McCown Road.[57] Some frequent users of this route noted problems keeping their vehicles clean of mud and dirt and

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[51]R. 802, 892, 1002, 1020-21, 1023 and 1076.

[52]R. 838.

[53]887-88, 968, 1015, 1020, 1076.

[54]R. 890-91, 896, 966-68, 976-77, 981, 985, 1001, 1019, 1023, 1052-53; See also Exhibit P-10.

[55]Id.

[56]Id at 890-91, 896-97, 966-67, 1019.

[57]R. 1001.

maintaining alignment of their tires.[58] Also, the closing of the Manchester bridge forced people using Manchester road as a detour from the south to risk taking other unknown gravel surfaced farm roads that were in similar condition to McCown Road.[59]

This gauntlet of obstacles and adverse conditions confronting Hay's customers caused a negative impact of Hay's sales and thereby its profits.[60] Between April, 1981 and December 1984 Hay's share of the western apparel market dropped from 25% to below 18%, resulting in lost profits of approximately $112,600.00.[61]

ARGUMENT

I. INTRODUCTION.

This inverse condemnation claim is seeking compensation from the State for the "taking" or "damaging" of

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[58]R. 896-97, 966-67, 1023.

[59]R. 1019-20.

[60]R. 916-17; See also, Exhibit P-8 at R. 663-68.

[61]Id.

Hay's property rights to use and enjoy its premises as a retail sales western apparel store.[62] Hay's claims that the road construction activities by the State were abusive, excessive and so substantially interfered with Hay's property right of access that a violation occurred pursuant to both the 5th and 14th Amendments to the United States Constitution and Article 1, Section 4 of the Louisiana Constitution.

This is a loss-of-access claim of a partial and temporary nature, but the loss-of-access was none the less abusive and substantial. As shown by the record and as was held by the trial court, for a time exceeding one year the State's activities substantially interfered with Hay's right of access to the system of streets and thoroughfares in a manner of travel normally used by Hay's and its customers. In that year, the State's activities during the construction repeatedly confused and frustrated travelers of La. Hwy. 397 (the main paved thoroughfare in the Chloe-Manchester Area) by permitting road closures to switch back and forth without notice from one end of the construction

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[62]See, Plaintiff's Petition at R. 7-8.

project to the other and, on many lengthy occasions, simultaneous closure at both ends, by failing to provide adequate detour signs, by failing to provide adequate official alternate routes and by taking no action to upgrade the condition of the roads which became defacto detours. For Hay's, the lack of adequate alternate detours caused almost complete reliance on McCown Road as the de facto but undesignated detour. During the construction project, McCown Road was a gravel surfaced farm road in very poor condition which was dangerous for travelers in passenger vehicles. McCown Road was adequate for use by farmers driving four wheel drive trucks, tractors and other farm machinery. However, it was a wholly unreasonable alternative, even as a detour, for the passenger type vehicles usually accustomed to using La. Hwy. 397 for access to Hays. If the State would have improved and upgraded McCown Road for use by passenger type vehicles, it might have served as a reasonable detour during the construction project were it not for the distance involved (as much as eleven miles). Instead, the State chose not to designate McCown Road as an official detour

and literally forced the use of a totally unreasonable alternative. The net result is that the State substantially interfered with and abused Hay's right of access due to its failure to ensure that sufficient and proper alternate routes were available and were identified.

II. **PURSUANT TO THE "TAKING" CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND/OR ARTICLE 1, SECTION 4 OF THE LOUISIANA CONSTITUTION, GOVERNMENT INTERFERENCE WITH HAYS' PROPERTY RIGHT OF ACCESS WAS UNREASONABLE, ABUSIVE AND SUBSTANTIAL WHEN, FOR PERIOD EXCEEDING ONE YEAR, THE STATE'S CONSTRUCTION ACTIVITIES REPEATEDLY CONFUSED AND FRUSTRATED TRAVELERS OF LA. HWY. 397 BY CAUSING ROAD CLOSURES TO SWITCH BACK AND FORTH WITHOUT NOTICE FROM ONE END OF THE CONSTRUCTION PROJECT TO THE OTHER AND, ON MANY LENGTHY OCCASIONS, SIMULTANEOUS CLOSURE AT BOTH ENDS OF THE PROJECT, BY FAILING TO PROVIDE ADEQUATE DETOUR SIGNS, AND BY FAILING TO PROVIDE ADEQUATE OFFICIAL ALTERNATE ROUTES WHICH RESULTED IN DUMPING TRAFFIC ONTO LITTLE KNOWN, DANGEROUS AND NARROW GRAVEL SURFACED FARM ROADS.**

A. Under the circumstances of this case, the magnitude of the governmental interference to Hay's property right of access greatly exceeds that which must be tolerated as a general consequence of the State's construction activities.

The law concerning the "taking" of access rights has followed an inconsistent application of legal principles.[63] This was a natural result of some forms of loss-of-access cases arising earlier than other kinds of non-trespassory takings when the courts were not willing to recognize takings without touching.[64] During the development of loss-of-access cases, the courts have frequently failed to ground their doctrines in sound eminent domain principles, but instead substituted arbitrary rules that, beside being indefensible in theory, may be meaninglessly broad or inflexibly narrow.[65] In this case, the Court of Appeal denied recovery to Hay's for this taking by improperly adopting several different eminent domain principles developed in Louisiana over

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[63]See, William B. Stoebuck, The Non-trespassory Taking in Eminent Domain, 22 (1977).

[64]Id.

[65]Id.

the years. Its conclusion that Hay's did not suffer substantial interference is based on earlier legal doctrines which no longer operate today as "blanket hard and fast rules" to bar recovery. These principles are today nothing more than factors to consider in the light of the factual circumstances of each loss-of-access case.[66]

Accordingly, interpretation of the factual evidence as to how it applies to the constitutional principles of "taking" is at the heart of this case. To date, the Trial Judge, the original trier of fact, held that Hay's suffered substantial interference with its property right of access due to action by the State. The Court of Appeal, the second, although improper by its own rules, trier of fact, held otherwise. Clearly, reasonable minds might differ in this case. But when constitutional principles are at stake, this Supreme Court must also review the evidence to make certain those principles have been constitutionally applied so that the

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[66]See, State through DOTD v. Chambers, 595 So.2d 598, 604 (La. 1992).

appropriate enforcement of a constitutional right is assured.[67] This Supreme Court must make an independent review of the whole record to determine whether, as a matter of law, the State's interference with Hay's property right of access was sufficiently substantial to constitute a "taking" requiring compensation under the 5th and 14th Amendments of the United States Constitution and/or Article 1, Section 4 of the Louisiana Constitution.[68]

To prove Hay's property rights were taken or damaged, the construction activities on the State's land must have resulted in serious inconveniences or interference that can be suppressed under LSA-C.C. Arts. 667 and 668.[69] These Louisiana Civil

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[67]Washington ex. rel. Oregon R. & N. Co. v. Fairchild, 244 U.S. 510, 32 S.Ct. 535, 56 LEd 863 (1912); Greenbilt Coop. Pub. Assoc. v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, LEd.2d 6, 13 (1970).

[68]Id.

[69]State through DOTD v. Chambers Inv. Co., 595 So.2d 598, 604 (La. 1992), Acadian Heritage Reality v. City of Lafayette, 434 So.2d 182, 185 (La. App. 3rd Cir. 1983), Ursin v. New Orleans Aviation Board, 506 So.2d 947, 955-57 (La. App. 5th Cir., 1987).

Code articles establish that although a landowner may exclude most interference with his property, he must tolerate certain inconveniences resulting from the lawful use of a neighbor's property.[70] This rule of law is similarly applicable when dealing with either government and the law of inverse condemnation[71] or private persons and the law of nuisance.[72] In determining the type of inconveniences that must be tolerated, one must determine the reasonableness of the conduct in light of the circumstances.[73] Some types of unreasonable conduct recognized in Louisiana are ultrahazardous activities, abusive or excessive conduct, and acts causing physical property damage or personal injury.[74] To determine whether the State's activities resulted in

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[70]Id.

[71]Chambers, supra, Acadian Heritage Realty, supra, Ursin, supra.

[72]Rodrigue v. Copeland, 475 So.2d 1071, 1077 (La. 1985) and Hero Lands Co. v. Texaco, Inc., 310 So.2d 93, 696-98 (La. 1975).

[73]Rodrigue, supra, Hero Lands Co., supra at 98 and Acadian Heritage Realty, supra, at 1986.

[74]Chambers, supra at 604-5.

unreasonable conduct, requires consideration of factors such as the characteristics of the neighborhood or area, the nature and degree of the intrusion to property rights and the effect on those rights.[75]

Of first consideration is the characteristics of the area confronting the State during the construction activities. In this case, the State embarked on a massive reconstruction project of La. Hwy. 397, the only major road in the Chloe-Manchester area.[76] As the main road, it was the sole access for several industrial, commercial and retail businesses in the area.[77] Within the construction project, La. Hwy. 397 was intersected by very few roads[78] and, more pacifically, there were no roads intersecting this highway between the north bridge and the south

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[75]See Chambers, supra at 605-06 and Rodrigue, supra.

[76]R. 785, 820,822-26; See Exhibit P-2 at Appendix F.

[77]R. 785, 820, 822-26; See Exhibit P-2 at Appendix F.

[78]R. 786-89, 804, 996, 1001-03, 1015, 1019; See Exhibit P-2 at Appendix F.

bridge except for one narrow gravel surfaced parish farm road named McCown Road.[79] The existence of this farm road, like all farm roads in the area, was virtually unknown to most of the people who traveled on La. Hwy. 397 and shopped at Hay's.[80] For most people, use of the main road (La. Hwy. 397) was their only known option.[81] Additionally, these farm roads, especially McCown Road, were in terrible condition.[82] At trial witness, Myron Sittig described McCown Road as follows:

. . .

Q Now tell me about McCown Road; did you ever encounter any difficulty on McCown Road?

A Yes, sir; I got stuck a couple of times.

Q What do you mean you got stuck; in the road or in the ditch?

A In the mud. It was in the road. The road was very muddy and had potholes, and I got stuck.

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[79] Id.

[80] R. 995-96; See also 968-69, 984, 986-87, 989-90.

[81] Id; See also 996 and Exhibit P-2 at Appendix F.

[82] R. 890-91, 896, 966-68, 976, 981, 1001, 1019-20, 1023.

Q How wide was the road portion of McCown Road?

A It might've been two car lengths wide, but the sides were so soft that if you got near it you were in the ditch. We passed several vehicles in the ditch during that time.

Q Is there any type of bridge on McCown Road?

A Yes, sir, there's one.

Q Where is that as between 397 and Manchester Road?

A It's right as you turn off of Manchester on to McCown Road.

Q Heading west?

A West, yes, sir.

Q And how many lanes are there in that bridge?

A One.

Witness Brenda LaCombe stated:

. . .

A . . . Now, when I was driving on McCown and Manchester, McCown was in horrible condition. When it rained it was -- you'd skid all over the road. I had little children with me and it was kind of scary. The bridge was real bad. It was a narrow one-lane bridge. It had no rails on the side. Even when McCown was dry, the potholes

were horrible. My car had to be -- I had my front aligned about twice in this time period.[83]

. . .

Q And which road are you talking about?

A McCown Road.

Q Did you feel it was dangerous?

A Yes, I do.[84]

James McDonald relayed his experiences on McCown road as follows:

A Then after that, there were times that trying to go either way, either north or south on 397 was blocked, but you could go back through the gravel roads -- it's McCown Road, and go down it, but it was rough going. It had potholes that were deep and all. And I remember one occasion where my truck drug bottom on going through some of the holes. It was a real rainy season and it was muddy and all.[85]

Witness Pauline Daughenbaugh, further explaining the

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[83]R. 966-67.

[84]R. 976.

[85]R. 1001.

condition of McCown Road and the other farm roads in the area, said:

. . .

> A . . . There's a back farm road, McCown Road, but the road is so full of potholes and muddy, it holds the water the majority of the year, any time we'd have a rain. But if the Manchester Bridge is out, which it stayed out for a while, okay? then you're still looking to come back down through another farm road that's bad, you know, if the bridges are in. A lot of our problem is the bridges on these back farm roads, but anyway, try to come down like that.

As explained by Mrs. Daughenbaugh, the closure of Manchester bridge forced people seeking a rout to La. Hwy. 397 into the tenuous situation of forging ahead on unknown and dangerous farm roads. The fact that the Manchester bridge was closed for safety reasons from January, 1982 through November, 1982[86] is further evidence of the poor conditions of these roads.

These farm roads may have been in adequate condition for farmers to drive their tractors and other farm machinery. However, they were no real alternative for either the type or the

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[86]R. 792-93.

volume of traffic usually accustomed to using La. Hwy. 397. For retail store such as Hay's, being located between the north bridge and the south bridge is a unique factor to these circumstances that made it so very important to maintain, at the very least and in a consistent manner, reasonable access on La. Hwy. 397 from either the north or the south. This need is even more evident when one considers the unique situation of Hay's as being the only retail sales business with its entire customer base outside the construction project.[87] No person could rightly expect retail shoppers in passenger vehicles to use those farm roads. This was the apparent intent of the State because testimony at trial indicated that the State did not intend for anyone to detour on those farm roads.[88] In fact, Gene Caldwell, the State's Project Engineer, testified that because no other State routes intersect La. Hwy. 397 within the limits of the construction project, the State was required at all times to

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[87]R. 986m 989-90, 1080-81; See, the Trial Court's Written Reasons for Judgment at R. 763.

[88]R. 838.

maintain access from either the north end or the south end of the project and that closure of the road in two separate places at any one time was denying access to the traveling public.[89] Although the State may have intended to always maintain access on the highway from either the north or the south, the record shows that for much of the time during the project, the only route available to Hays was via farm roads.[90] This fact was ignored by the Court of Appeals.

As admitted by the State's project engineer, construction activities, no matter how slight, inconveniences traffic.[91] This is supported by the fact that as soon as the official detour signs were erected in April, 1981, shoppers began avoiding the area[92] and Hay's sales leveled off.[93]

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[89]R. 1108.

[90]R. 887-88, 968, 1015, 1020, 1076.

[91]R. 826.

[92]R. 1035-37, See also, 976, 1022-23.

[93]R. 665-66.

However, construction activities quickly increased in intensity to a "high key" level that was quite extensive both in size and duration.[94] In addition to and simultaneously with these activities, access was denied at points on the highway during the north bridge construction, the south bridge construction, the twenty-one cross drain installations across the highway at various times and various locations north and south of Hay's, and the excavation and replacement of the entire asphalt and concrete base along the north one-half mile of the project.[95] For over one year, this "high key" activity was occurring simultaneously throughout the entire length of the project and always caused at several different points within the construction zone much interference with the traffic flow.[96]

These "high key" construction activities, even if performed in a most organized and efficient manner (which is

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[94]R. 825-26.

[95]R. 838-39, 841-42, 1062-73; See also Exhibit P-12 at Appendix G.

[96]R. Id.; See also, R. 894-96, 976-77, 986, 1006-07, 1015-16, 1018-21, 1023, and 1075-76.

denied) and with due consideration of the character of the area (which is also denied), will cause "quite a bit" of interference to one's property right of access.[97] However, in addition to the duration, size, and extensiveness of this project, Hays suffered substantially more interference due to the abusive and excessive manner in which the construction activities were performed. As if without any scheme or plan, activities causing road closures constantly switched from the north end to the south end of the project and, for extended periods of time, both ends of the project would close simultaneously.[98] This caused frustration and confusion for Hay's and its customers because they never knew which route, if any, would be open.[99] This was the conclusion of the trial court[100] and these factual determinations are fully supported by the record.

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[97]R. 826.

[98]See Exhibit P-12 at Appendix G.

[99]R. 894-95, 976-77, 986, 1006-07. 1015-16, 1018-21, 1023, 1075-76.

[100]R. 761-62.

The north bridge was closed form October 5, 1981 to February 26, 1982.[101] However, as soon as the bridge was opened, cross-drains were installed around the north bridge from March 6 through April 2.[102] The highway was maintained and the "Road Closed" signs were positioned in a way to mislead travelers into believing the road at the north end remained closed.[103] Brenda LaCombe testified that she attempted to use the north route every school day and did not realize the north bridge was open until Easter of 1982. She said:

. . .

Q Now when you first started driving and they first started the work which way did you travel to get to the store?

A Before they tore up the bridge I would go down Highway 90 and turn left on 397 and go pick up the kids and come back that same way.

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[101]R. 838-39; See Exhibit P-12 at Appendix G.

[102]See Weekly Force & Progress Report Nos. 48, 49, 51, 82 at R. 561, 559, 555, 553, respectively; See also Exhibit P-12 at Appendix G.

[103]R. 964-65; 970.

Q When you say tore up the bridge, you're talking about the north bridge or the south bridge?

A The north bridge.

Q And where would you go after they tore up the north bridge?

A I had to go down Manchester and then McCown and then hit 397.

Q Was there any other way to get there other than that route?

A Well, if I wanted to detour all across town I could go the long way, all the way down to Highway 14, which would be totally out of my way.

Q You'd have to go to 14 and then --

A Go all the way around 14 and come up 397.

Q -- and come up 397?

A Right.

Q And I'm sure you don't recall the dates or for how long that north bridge was closed, do you?

A All I can remember is that it was not long after school started. It was during Wintertime and it - until -- I can't tell you exact dates. The only thing I can remember is that around Eastertime I was going to pick up the kids on that road and it had been open because -- and the reason I

remember is because I got a ticket on the road that day.[104]

. . . .

Q Let me ask you this. If my records show that the north bridge was closed from October of '81 to the end of February of '82, and that's quite a long time, I think from February 26th until Easter, what was the reason that you couldn't travel, say, from the 26th of February until --

A I can't tell you exactly when it opened. The only thing I can tell that makes me remember being down that road is the ticket, and it was prior to Easter.[105]

Also, while those cross-drains were being installed at the north end, cross-drains were also being installed at the south end.[106] The installation of these cross-drains either near or south of the south bridge caused actual road closures to switch back and forth from the north to the south. However, to some people

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[104]R. 964-65.

[105]R. 970.

[106]See, Weekly Force & Progress Report Nos. 49, 50, 51, 82, 83, 84, at R. 559, 557, 555, 553, 551, 549, respectively.

such as Ms. LaCombe, there was the perception that the road was closed at both ends simultaneously.

Simultaneous road closure was not just a perceived problem. It actually occurred between June and September of 1982 when the south bridge was closed, additional cross-drains were installed, and the complete excavation of the north end of the highway was accomplished.[107] Contrary to the findings of the Court of Appeal, the trial court found that these activities closed La. Hwy. 397 both north and south of Hays simultaneously.[108] This factual determination is also supported by the record. Myron Sittig testified:

. . .

Q And during 1981 did you encounter any difficulties?

A Yes, sir.

Q Would you tell me when and how?

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[107]R. 841-42, 1062-73; See Exhibit P-12 at Appendix G.

[108]R. 762.

A I don't recall the dates, but I do recall the difficulties in getting out. There were days -- I'm not sure if it was '81 or '82, but there were days that I'd have to go down and go to McCown Road, go east on McCown Road, go north on Manchester Road, come back west on 90 and hit the Interstate 210.

Q Why couldn't you go to the south?

A There was a bridge out.

Q And how long was that bridge out?

A I don't know, but it was a while.

Q Was there any other way for you to get out other than to go to McCown Road?

A Not when they had the north bridge out also. When both were out, that was the only way out.

Q When you say they were both out, were they out at different times or at the same time?

A The north bridge was out for a while without the south bridge but at one -- a while there they were both out at one time.[109]

Also, Pauline Daughenbaugh stated that this situation lasted for months when she said:

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[109]R. 887-88.

Ray Harris also confirmed this when he said:

. . . .

Q . . . Mr. Caldwell has testified that on no occasion was both ends of 397 cut off. Now during the time when the south bridge was being constructed, was there ever any time when you know that the entirety of the road or the bridge at the north end was shut down to where it was cut off at both ends?

A Where it was closed both at the same time?

Q Yes, sir.

A They definitely were closed at the same time.

Q You know that of your own knowledge and you saw it?

A Yes, sir.

Q And for how long a period was that?

A I don't remember the dates, but it was for a while. It was for a good while. It was months. It wasn't a week or day or two; it was months at a time.

Q And was there a barricade to keep traffic from going through at that time?

A Were there signs?

Q Signs, yes.

A Detouring, at the north end, yes, sir. Whenever you first turned in.

Q When you say it was closed, what do you mean it was closed? It was impassable or --

A If you were to turn from 90 heading south going to 14, you couldn't make it. If you were to turn on to 397 from 14 going north, you could not go to 90.

Q Why could you not go?

A Both bridges was closed at the same time. Or they were digging up and putting pipes up, in different locations.

Q And you've heard testimony from this gentlemen about they were supposed to do half the road at one time; is that the situation you found, or did you find the whole road closed?

A In reference to the bridges and the north end work?

Q Yes, sir.

A It was done all at one time. It was not done half at a time.[110]

During the construction project, Ray Harris kept notes of the activities he observed between August of 1982 through the end of the project. His recollection of these days explaining the

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[110]R. 1144-46.

full extent to which the north end was blocked while the south bridge was closed is found in the Record at pages 1062 through 1070.

Further evidence of the abusive and excessive manner in which the construction was performed was the fact that when the highway was closed there were no detour signs advising of alternate routes.[111] Myron Sittig recalled:

> Q Did you ever see any detour signs on 397?
>
> A It had "Road Closed" maybe once, but it didn't have any -- It just said "Road Closed" and "Detour", but it didn't have directions as to where to detour to.

Al Prater, the Public Works Director for Calcasieu Parish, indicated that it was usual practice for the State not to put up "Detour" signs. He said:

> A . . . A lot of times they don't put up signs, you know, directing them where to go' they just kind of dump it off on us and we assume traffic.
>
> Q That's a good question. If they don't put up signs, who do you ask?

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[111]R. 802, 892, 1002, 1023, 1076.

A Well, you use your road map or something to figure out where you're going, but, you know they're not designating that the traffic is to take our road, but it happens to us.

Q When you say use a road map, you're talking about a state road map or a parish road map?

A Probably a parish road map. I don't think -- The parish roads are not going to be on the state roads.

Q So if you didn't know where McCown Road was, or Manchester Road, those do not show up on your state map; is that correct?

A I don't think they would.[112]

Pauline Daughenbaugh explained her frustration when she testified:

. . .

A . . . See, it takes a lot -- We're talking -- My biggest gripe about all this, is the time it would take me to try to get to Ray, Jr. and I'd hit a detour sign. Okay? So I'd have to go back and try another detour, with no explanation saying, "Well, you could go this way," or point an arrow or, you know, "It'll be open in a day or so." If I was given any information, that would've saved me a lot of personal time, and time is money, like anybody's time. But here, I'm running around, you know, that I have to go back to a

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[112]R-802.

telephone and call Ray, Jr. and say, "How do I get to you?"[113]

The frustrations and confusion caused by the arbitrary road closures and by the lack of proper detour information is evident by the testimony in the record.[114] Myron Sittig explained her frustration when she testified:

. . .

Q Did you ever have any difficulty in getting to the Hay's Western Wear Store?

A The same difficulty I had coming and going every time I left my house, which was -- I would leave one morning to bring my husband and if I come back two hours later I may not be able to come in that way, I'd have to go all the way around. Like, when the south bridge was in, take off and leave, or -- At one time they even had shell in the area and you could come, but then you may go out and come back two hours later and it's dug up and you couldn't come back that way and you had to go all the way around. There may -- I mean, there were cuts back there, I know now, but I did not know at the time.

Q How many times did that happen to you?

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[113]R. 1023.

[114]R. 894-96, 986, 1006-07, 1015-16, 1018-21, 1023, 1075-76.

A Several.

Elaine Ritchey, a store employee, explained:

A We'd get calls -- A lot of our business came from Cameron, Bell City and Hayes, especially around rodeo season or just, you know, -- That was a lot of our customers on that end. And they would call and want information on how to get there. We started giving them directions coming down Manchester, and then from -- Well, -- But then we started getting a lot of complaints that they couldn't even go down there because of the road conditions, to where we would get calls that they were telling us that they didn't know how to get there and we were dumbfounded. It got to where we were telling them how to circle all around, which -- coming down Highway 14 to Prien Lake Road or going to Highway 90.

Q Were there any points during that period where you had to change what you were telling them --

A All the time.

Pauline Daughenbaugh also stated:

. . .

Q Well, did you know from one time to the next how you were going to be able to get there?

A Never. Because it could change like -- I could've went through, say, to go up, down 397 north and then go into town like up East Prien Lake Road, and maybe coming back I couldn't

come back through. You see what I'm saying? -- to go the same direction I just came.

Q Why not?

A Because a detour sign was put up; the road was closed.

Q You mean, after you would go one way and then try to go back they would've changed it?

A Yes, sir.

Q And would that happen within one day that this would happen?

A Oh, this would happen -- Oh, yeah, this would happen within an hour. You know, I'm just saying from where - You know, I've ran errands for an hour or so and had to go back by Hay's store to pick up whether it be hats or saddles or whatever and come back and it was closed; I couldn't go back.

Q How many times has this happened to you?

A More than once. Easily, five or six times over the period.[115]

. . . . .

Q And what problem did you encounter on Highway 397 at that point?

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[115]R. 1015-16.

A Well, the road was just blocked off. You couldn't go down -- It wasn't open; it was under construction; it was a detour.

Q To the best of your memory, how long did it stay closed?

A On and off, better than two, three years.

Q Well, at the end of the project, either down to the south and to the north, did they keep signs posted to tell you what was going on give you a route or tell you how to get to any place in between?

A There was never a route. There was always just "Detour". Then you'd come back around the other side, "Detour". You never knew "Detour" an hour, "Detour" a couple of days, "Detour" a week, or "Detour" using an alternate route. It was never -- It was never -- It got to the point that before I left the house back here, which we lived in the country, I'd call Ray, Jr. and say, "Okay, what's open today? How am I going to get to you?"

Ray Harris testified as to the numerous complaints he received from his customers. He said:

. . . .

Q Mr. Harris, is there any question in your mind as to what caused your business to start sustaining losses after 1981?

A The closure of the bridges and isolating us from everything.

Q And was it readily apparent to you what the basis for the problem was?

A You mean, what caused it, or the bridges being shut?

Q Yes. How did you know that's what was giving you the trouble?

A Because all the phone calls we had and the people weren't coming because of the detours. They never knew from one day to the next how to get to the store. They didn't know if there was going to be a route.

Q Did you have complaints?

A Constantly.

Q Are we talking about one or two isolated complaints or how often did you get complaints?

A Every day, two, three, four, a dozen, but there was a complaint every day.

Q Did you lose customers?

A Definitely.[116]

Due to space limitations, we were unable to include the testimony of many other witnesses in this application.

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[116]R. 1075-76.

The testimony of these witnesses, the documentary evidence and the record as a whole fully support the trial court's conclusion that the construction activities resulted in extreme difficulty and substantial interference with Hay's and its customers gaining access to and from the store. Since the Court of Appeal was faced with a cold record which presents no opportunity to hear firsthand the testimony of witnesses or to observe their demeanor in court, Trial Judge was in a better position to evaluate their credibility and to weigh the evidence.[117] For this reason, the reviewing Court must give great weight to the factual conclusions of the trier of fact and where there is a conflict in testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review; even though the reviewing court may feel that its own evaluations and inferences are as reasonable.[118]

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[117]Canter v. Koehring, 283 So.2d 716, 724 (La. 1989).

[118]Id.; See also, Rosell v. ESCO, 549 So.2d 840, 844-45 (La. 1989); Acadian Heritage Realty v. City of Lafayette, supra, at 189.

In this case, the Court of Appeal, Third Circuit rejected the factual findings of the trial court and, in doing so, rejected Louisiana's "manifest error - clearly wrong" appellate review standard. That Court has increasingly disregarded this appellate review standard to the point that the issue escalated to a public controversy[119] wherein the chief judge of that circuit stated that the majority opinion in Kelly represented a "dramatic departure from the recognized rules of appellate review."[120] In this case now before you, Hay's asserts that the Court of Appeal, Third Circuit again exceeded its legal authority to review the factual determinations of the trial court. This action violated Hay's constitutional right to procedural due process as guaranteed by the 5th and 14th Amendments to the United States Constitution.

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[119]See, Lake Charles American Press, December 23, 1993, at page 1, col. 5, reporting on the recent case of Kelly v. Louisiana Limestone Aggregate, No. 92-1287, slip op. at separately paginated dissent (La. App. 3rd Cir., December 15, 1993) (Domengeaux, C. J. and Yelverton, J. dissenting) at Appendix E.

[120]See a copy of the article and dissenting opinion attached as Appendix E.

For this reason, the factual conclusions of the Court of Appeal should not bear as much weight as those of the trial court.

B. In the interests of equity, just compensation cannot be denied when there has been unreasonable, abusive, excessive and substantial governmental interference with one's property right of access merely because the interference with the access was not unique only to him but was general to the public and/or the interference was partial and temporary.

The court of appeal held that Hay's did not experience interference compensable "under our law."[121] In addition to rejecting the factual determinations by holding, there was no evidence in the record of excessive and abusive conduct by the State,[122] the Court of Appeal denied Hay's recovery because the inconvenience experienced by Hay's was not peculiar to it but was experienced by the public at large and because Hay's loss-

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[121]Opinion of the Court of Appeal, Third Circuit, No. 92-1375 at p. 4, See Appendix C.

[122]Hays' objection to this holding is fully argued in the brief, See Argument II, A.

of-access was never completely blocked.[123] It presents these reasons as irrebuttable presumptions which automatically deny Hays' claim for compensation due to governmental interference with its property right of access.[124] However, these principles of law should not operate as a blanket, hard and fast rule to bar recovery.[125] The United States Constitution 5th Amendment's "just compensation" provision is designed to bar government from forcing some people to bear the burdens which, in all fairness and justice, should be borne by the public at large.[126]

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[123]Id.

[124]Id. at 3-4.

[125]See, Constance, 626 So.2d 1151, 1157, 1159-61 (concurring opinion of Dennis, J.)(La. 1993) Chambers, supra, at 604, Rodrigue vs. Copeland, 475 So.2d 1071, 1077 (LA. 1985), Acadian Heritage Realty, supra at 1986, Hero Lands Co. vs. Texaco, Inc., 310 So.2d 93, 98 (La. 1975); In review of LSA-C.C. arts. 667 and 668, all of these cases held that the trier of fact must consider the reason-ableness of the conduct in light of all the circumstances.

[126]First English Evangelical Lutheran Church v. County of Los Angeles, Cal., Glendale, 482 U.S. 304, 319, 107 S.Ct. 2378, 96 LEd.2d 250 (1987) quoting Armstrong v. U.S., 364 U.S. 40, 49, 80 S.Ct. 1563, 4 LEd.2d 1554

Equity and fairness demand that when governmental interference with one's property right of access is unreasonable, excessive and abusive to that property owner's particular circumstances, just compensation should not be denied because some of the governmental interference was similarly experienced by the public at large. To deny recovery to an entire neighborhood that suffered damage due to abusive and excessive governmental conduct rewarding the government for improper conduct. For example, suppose that during a construction project the State imposed upon a group of property owners such inconveniences that its actions rose to the level of excessive or abusive conduct. Although the property owners all suffered more serious interference than was expected to be tolerated under Louisiana Civil Code Article 667, and although there was a "taking" or "damaging" of the owner's property rights, none of them would be entitled to damages. Therefore, in the interests of equity, whenever the actions of the State rise to the level of

(1960).

excessive or abusive conduct, all adversely affected property owners should be entitled to damages despite the fact that the same interference was suffered by all those in the general neighborhood. The Constitutions of the United States and Louisiana would have no meaning if the State is insulated from its actions in isolating a neighborhood within a construction project by access that becomes an absurdity due to distance, substandard condition of the roads used for access, excessive confusion or any other factor. If the logic of the honorable Court of Appeal is correct, the State can re-route traffic for a neighborhood by way of Alaska with absolute immunity. At what point does distance become abusive, excessive, substantial or unreasonable?

Accordingly and for similar equitable reasons, Hay's claim for compensation should not be summarily denied because its access was not completely blocked by the abusive, excessive, unreasonable and substantial governmental interference. If the access that remains does not reasonably maintain access to the gene system of public roads by means of transportation that is

normal for land so situated, then the fact that only some round-a-bout, dangerous and inappropriate access exists should not bar recovery.[127] Additionally, the fact that unreasonable and substantial interference with Hay's right of access lasted for a temporary period of time of approximately one year is of no consequence.[128] The "taking" clause of the 5th Amendment mandates payment of compensation for a temporary "taking." (i.e. temporary but substantial governmental interference with one's property right of access).[129]

In this case, since Hay's property rights were substantially interfered with by abusive or excessive conduct of the State, Hay's is entitled to recover damages regardless of the fact that the interference may have been suffered by the general public and/or the interference was only a partial and temporary loss-of-access.

[127]See, Stoebuck, supra, 70-71 and Constance, supra, at 1159-60.

[128]First English Evangelical Lutheran Church, supra, at 318.

[129]Id.

III. THE TRIAL COURT'S CONCLUSION THAT HAY'S SUSTAINED ECONOMIC LOSS IN THE SUM OF $67,849.00 IS FULLY SUPPORTED BY THE RECORD AND IS NOT AN ABUSE OF ITS DISCRETION.

When "property" has been taken or damaged by the State, the owner is entitled to be compensated to the full extent of his loss.[130] The intent of this law is to place the owner in equivalent financial circumstances after the taking by compensating him for all losses sustained.[131] This includes loss of revenue occurring from the taking or damaging of a business and the cost of re-establishing that business.[132]

In this case, the trial court awarded $21,549 for lost profits due to loss of revenue and $46,300 as a residual cost due

[130]LSA-CONST. Art. 1, Sec. 4; See also, Hargrave, The Delcaration of Rights of the Louisiana Constitution of 1974, La.L. Rev. 1, 15-16 (1977), State DOTD v. Dietrich, 555 So. 2d 1355, 1358-59 (La., 1990).

[131]Id. and Chambers, supra at 602.

[132]Hargrave, supra at 16, State DOTD v. Dietrick, supra at 1358, and State, Dept. of Trans. & Dev. v. Tynes, 433 So.2d 809, 817-18 (La. App. 1st Cir., 1983).

to the need to mark down, dispose of and replace old inventory in an effort to re-establish the business that had been taken or damaged.[133] The trial court relied on the testimony of employees of Hay's and Dr. Michael Kurth, Ph.D., an economist, concerning the extent of the damages suffered.[134] Dr. Kurth conducted an analysis of the economic loss suffered by Hay's as a result of the construction activities.[135] He analyzed the daily sales records, financial statements, and inventory data of Hay's from 1978 to 1985.[136] He discussed at length with Mr. Ray Harris, the only officer and sole shareholder of Hay's, the facts and circumstances at the store, its operation and the effect of the construction activities to Hay's.[137] He also analyzed sales data from 1981 to 1985 of Cowboys Western Wear Store and Frank's Western

[133]R. 764-65.

[134]Id.

[135]R. 909-10.

[136]R. 910; See Exhibit P-8 at 663-68.

[137]R. 910.

Wear Store, both local competitors of Hay's in retail sales western apparel market.[138]

From the data and information available, Dr. Kurth determined Hay's lost profits by comparing its revenues before, during and after the construction activities to its competitors calculating Hay's market share over this period of time, determining the loss of market share Hay's experienced during the construction activities, and calculating the difference between the projected revenues Hay's would have earned had there been no loss of market share and Hays' actual revenue.[139] Finally, the lost revenues were then multiplied by Hay's inventory markup to calculate its lost profits.[140]

Dr. Kurth concluded that Hay's lost profits of $6,737 between March, 1981 and September, 1981, $21,549 between October, 1981 and September, 1982 and a residual loss due to

[138]R. 910-11; See also, Exhibit P-8 at 663-68.

[139]R. 912-18; See also, Exhibit P-8 at 663-68.

[140]Id.

old, unwanted inventory of $84,314.[141] With respect to residual loss, Dr. Kurth calculated an alternate method based on Hay's taking drastic action by advertising a big sale, dumping its old inventory at rock bottom prices, and theoretically minimizing its losses.[142] He concluded that the residual loss incurred under this alternate method was $46,300.[143]

The estimate of lost profits was conservative in nature. Dr. Kurth did not consider any factor that might tend to add speculation to his estimates.[144] He did not consider facts such as Hay's doubling the size of its store, renovations to the store or increasing its inventory.[145] Also, the fact that a slump in the economy occurred around the same time that the construction activities began was neutralized by Dr. Kurth's analysis.[146] He

[141]See Exhibit P-8 at 663-68.

[142]R. 926.

[143]See Exhibit P-8 at 664.

[144]R. 922, 928-30.

[145]R. 920-21.

[146]R. 930.

calculated Hay's projected sales based on the actual sales of Hay's competitors in the market.[147] As the competitors' actual sales fluctuated with the economy, so did Hay's projected sales.[148] Dr. Kurth's detailed analysis of lost profits fully supports an award to Hay's for business damages.

In the event this court finds that Hay's is entitled to compensation for damage to a property right, deference should be given to the determinations of the trial court. The trail court accepted the analysis of Dr. Kurth as sufficient to support its conclusion that Hay's incurred business losses from $67,849. The manifest erred doctrine is also applicable to the weight given expert testimony by the trial court and to awards for damages made by the trial court.[149] As in this case, where the experts well reasoned testimony supports an award for damages, when it

[147]See Exhibit P-8 at 666 and 668.

[148]Id.

[149]Acadian Heritage Realty, supra, at 189; State v. Dietrich, supra at 1359.

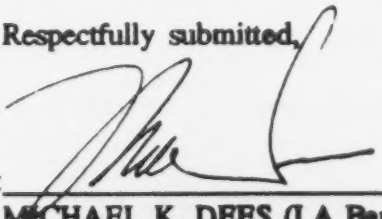
is uncontroverted, where it is accepted by the trial judge, the property owners should prevail.[150]

Finally, if Hay's prevails on the previous issues set forth in this case, then the trial court's award for attorney fees and assessments of court costs should be reinstated.

CONCLUSION

By the abusive and excessive construction activities that occurred along La. Hwy. 397 for a period of over one year, the State has taken or damaged property owned by Hay's. The trial court so held and awarded $67,849 in damages. The decision of the court of appeal should be vacated and the judgment of the trial court should be reinstated.

Respectfully submitted,



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[150] State, DOTD v. Dietrich, supra.